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EU Law Constraints on intra-EU

Investment Arbitration?

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1. Introduction

The law of the European Union (EU) ‘constitutes a new legal order of international law’;¹ it is its ‘own legal system’,² representing a ‘constitutional legal order’ with its own coherence and logic.³ One concomitant of this development has been that the EU organs jealously guard the autonomy of EU law.⁴ With the accession to the EU of the Central and Eastern European States almost 200 BITs became intra-EU and the possibility of intra-EU proceedings under the European Energy Charter Treaty (ECT)⁵ greatly increased.⁶ The EU, through the European Commission, has taken a tough stance on intra-EU investment arbitration, essentially seeing intra-EU investment arbitration as an anomaly to be combatted with all means.⁷

¹ Case 26–62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

² Case 6–64 *Costa v Enel* [1964] ECR 585.

³ See e.g. E Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 47 AJIL 1; JHH Weiler, ‘The Transformation of Europe’ (1990–1991) 100 YLJ 2403; M Rasmussen, ‘Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment’ (2014) 12 I•CON 136; V Lowe, ‘The Law of Treaties; Or, Should this Book Exist?’ in in CJ Tams, A Tzanakopoulos, and A Zimmermann (eds), *Research Handbook on the Law of Treaties* (Elgar 2014) 3, 5–7. Cf, however, F Berman, ‘Community Law and International Law: How Far Does Either Belong to the Other?’ in *The Clifford Chance Lectures Volume I: Bridging the Channel* (ed Markesinis, 1996).

⁴ See e.g. Opinion C–2/13; B Stirn, *Towards a European Public Law* (E Bjorge tr, OUP 2017) Ch 3.

⁵ Energy Charter Treaty (ECT), 17 December 1994, 2080 UNTS 95.

⁶ J Kleinheisterkamp, ‘Investment Protection and EU Law’ (2012) 15 JIEL 85.

⁷ See the views of the EU made known and referred to in cases such as e.g. *Oostergetel & Laurentius v Slovakia*, UNCITRAL *ad hoc* Arbitration, 30 April 2010; *Electrabel v Hungary*, ICSID Case No ARB/07/19, 30 November 2012; *Achmea BV (formerly known as Eureko BV) v Slovakia*, PCA Case No 2008–13, Award on Jurisdiction, Arbitrability, and Suspension, 26 October 2010; *European American Investment Bank AG (Austria) (‘EURAM’) v Slovak Republic*, PCA Case No 2010–17, Award on Jurisdiction, 22 October 2012.

Article 344 of the Treaty for the Functioning of the European Union (TFEU)⁸ provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.’ This provision does not provide for an absolute monopoly for the CJEU over the interpretation and application of EU law: the CJEU has no monopoly, for the simple reason that courts and tribunals throughout the Member States of the EU apply EU law daily. There is a monopoly only over the authoritative interpretation or application of EU law. It applies only to inter-State disputes, that is, disputes submitted by the States Members, and not to disputes between a private investor on the one hand and a Member State on the other.⁹ But Article 344 would nevertheless, so far as EU law is concerned, prevent State–State dispute settlement between Member States as to the scope of EU law under an investment agreement to which both the EU and the Member States are parties.¹⁰ Indeed Opinion 2/13 seems to lay claim to a broad monopoly on the part of the Court of Justice of the European Union (CJEU).¹¹ In that regard the European Commission on 29 September 2016 sent a formal request to Austria, the Netherlands, Romania, Slovakia, and Sweden, asking these Member States to terminate their intra-EU bilateral investment treaties, arguing that since the enlargement of the EU such extra reassurances as to investment protection are supererogatory, as EU rules in the single market, such as the freedom of establishment and free movement of capital, already provide a legal framework for cross-border investments.¹²

⁸ Consolidated versions of the treaty on European Union and the Treaty on the Functioning of the European Union, [2016] OJ C 202 (TFEU).

⁹ See Case C-284/16 *Slovak Republic v Achmea BV* (pending before the CJEU).

¹⁰ S Schill, ‘Opinion 2/13—The End for Dispute Settlement in EU Trade and Investment Agreements?’ (2015) 16 *The Journal of World Investment & trade* 379, 384.

¹¹ . Opinion C–2/13 paras 182–86.

¹² See European Commission—Fact Sheet, 29 September 2016, para 6.

In the view of the EU, it follows from the primacy and autonomy of European Union law that no Member State can be directly or indirectly involved in intra-EU investment arbitrations. That would breach the fundamental elements of the European Union legal order and its judicial system, as bilateral investment treaties deal with subjects which are taken to fall squarely within the scope of the Treaty of the Functioning of the European Union.¹³

The Commission distinguishes between extra-EU BITs and intra-EU BITs; its concerns about extra-EU BITs relate to questions of treaty making competence and incompatibility with mandatory EU law relating to investment, capital movements, and payments.¹⁴ After the entry into force of the Lisbon Treaty the EU enjoys, as a part of the common commercial policy,¹⁵ exclusive competence in respect of foreign direct investment. The Commission does not take issue with third party arbitration mechanisms set out in these BITs entered into with non-EU countries.¹⁶ The Commission's concerns with intra-EU BITs, however, relates to the compatibility of such BITs with the mandatory provisions of EU law and are of a different order altogether.¹⁷ This argument goes also for the ECT, which together with the Protocol on Energy Efficiency and Related Environmental Aspects,¹⁸ sets up a multilateral regime for energy co-operation, with a view to accelerate economic recovery in Eastern Europe by way of co-operation in the energy sector.¹⁹

¹³ e.g. rules regulating aspects of foreign investment activity, including for post-establishment treatment and operation, that is, rules on right of establishment and on capital movements and transfers: see especially Part Three, Title IV, Ch 2 of the TFEU, Arts 49–55; and Ch 4, Arts 63–66. See European Commission Observations, 13 October 2011, in *EURAM v Slovak Republic*, p 1–2.

¹⁴ *Eureko v Czech Republic*, PCA Case No 2008–13, Award on Jurisdiction, Arbitrability, and Suspension, 26 October 2010, para 176.

¹⁵ TFEU Art 207(1), Art 3(1)(e).

¹⁶ *Eureko v Czech Republic*, PCA Case No 2008–13, Award on Jurisdiction, Arbitrability, and Suspension, 26 October 2010, para 176.

¹⁷ *ibid* para 177.

¹⁸ 17 December 1994, 2081 UNTS 3.

¹⁹ See J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 336.

According to the European Commission, intra-EU BITs amount to an ‘anomaly within the EU internal market’; there is, in the view of the Commission, at least a partial overlap between the intra-EU BITs and the internal market provisions of the EU, and this calls into question the permissibility of the continued existence of intra-EU BITs.²⁰

It might be asked whether the debate about the role of EU law in intra-EU investment disputes is no more than a re-run of the old debate of the alleged primacy of domestic law over international law in investment disputes? Many writers, States, and Tribunals opposed, for a long time, the idea that international law had a direct role to play in the settlement of investment disputes.²¹ In a classic article from the turn of the century Prosper Weil pointed up the ‘ingrained ... reluctance [of some] to introduce international law in investment relations’.²² For decades there was strong reluctance towards what has later come to be known as ‘the internationalization of legal investment relations’.²³ International law, the argument ran, should not be allowed to govern what was argued to be matters for domestic law.²⁴ Judged in that light, the views of the European Commission seem to some extent to be a re-run of old arguments; in the view of the Commission, international law should not be allowed to govern matters which are for EU law.

²⁰ *Eureko v Czech Republic*, PCA Case No 2008–13, Award on Jurisdiction, Arbitrability, and Suspension, 26 October 2010, para 177.

²¹ See e.g. *Serbian Loans* (1929) Series A No 20–21, 42 (‘Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms part of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws.’); *Petroleum Development Ltd v The Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149; *Texaco Overseas Petroleum, Co & California Asiatic Oil Co v The Government of the Libyan Arab Republic* (Merits) (1977) 53 ILR 389, 443; AD McNair, ‘The General Principles of Law Recognized by Civilised Nations’ (1957) 33 BYIL 1; GR Delaume, ‘The Proper Law of State Contracts Revisited’ (1997) 12 ICSID Review—FILJ 1.

²² P Weil, ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage À Trois*’ (2000) 15 ICSID Review—FILJ 401, 410.

²³ *ibid* 411.

²⁴ See the case-law referred to in footnote 21.

Going from the specific to the general, from the bilateral to the multilateral, the attention is turned first, in Part 2, to intra-EU BITs and then, in Part 3, to the ECT, focusing on the question of so-called disconnection clauses. Part 4 turns to whether anything can be gleaned from other more or less self-contained ‘constitutional’ systems of international law, that is the 1982 United Nations Convention on the Law of the Sea (UNCLOS)²⁵ and the European Convention on Human Rights (ECHR).²⁶ Part 5 deals with the question of whether it is not the case that, in common with any other norm of international law, the argument could be made that an intra-EU BIT or the ECT should be interpreted against the background of other international law, and the EU law is no less other international law than are other international norms? The concept of jurisdiction is key throughout, as the validity of the bilateral investment treaty invoked in arbitration is a pre-requisite for the tribunal’s ability legitimately to assert jurisdiction.

2. Intra-EU BITs

As adumbrated above, the EU takes the view that intra-EU BITs have been terminated. One strand of this argument is based on Article 59 Vienna Convention on the Law of Treaties.²⁷ Article 59 provides that:

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be

²⁵ 10 December 1982, 1833 UNTS 3.

²⁶ 4 November 1950, 213 UNTS 222.

²⁷ 22 May 1969, 1155 UNTS 331.

governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

Could it be held, in respect of countries that joined the EU after having signed a BIT with a EU Member, but before the Treaty of Lisbon, that the accession to the EU treaties terminated the BIT? This argument has consistently failed, and rightly so, for a number of reasons. One is that the ECT or a BIT does not relate to the same subject matter as the pre-2009 EU Treaties,²⁸ and that it would scarcely be right to say that the States Parties to the BIT have manifested a clear common intention to terminate the BIT—which Respondents have tried to infer.²⁹ Investment tribunals followed this approach and therefore refused to uphold the jurisdictional objections raised by the Respondent State and supported by the Commission.

Tribunals such as the one in *Achmea BV v Slovakia* have not accepted the arguments of Respondent States and of the European Commission that the BIT at issue was terminated and/or superseded.³⁰ In *Oostergetel & Laurentius v Slovakia*, where the Respondent had argued that the BIT had been terminated upon Slovakia’s accession to the EU, the Tribunal held that the BIT was not terminated and that ‘the Tribunal does not see any direct conflict between the BIT and the relevant EU law provisions that would impede it from applying the two sets of legal norms simultaneously, should such a need arise’.³¹ Accession to the EU in 2004 was ‘without prejudice to the continuing

²⁸ *European American Investment Bank AG (Austria) (‘EURAM’) v Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction, para 185.

²⁹ *ibid* para 194.

³⁰ *Achmea BV (formerly known as Eureko BV) v Slovakia*, PCA Case No 2008–13, Award on Jurisdiction, Arbitrability, and Suspension, 26 October 2010, para 218.

³¹ *Oostergetel & Laurentius v Slovakia*, UNCITRAL *ad hoc* Arbitration, 30 April 2010, para 74.

application and validity of the existent BITs'.³² Nowhere does the Accession Treaty say that it governs the matter of bilateral investment protection. Against this background it seems, as a matter of principle, a difficult argument to make to say that the mere fact that a State joins the EU should be taken to mean that it intended to terminate all its intra-EU BITs. General de Gaulle is reported to have quipped that 'treaties are like roses and young girls; they last while they last':³³ but, as James Crawford has observed, the reality of the matter is that 'treaties are enduring instruments, not easily disposed of'.³⁴

3. The ECT and the Question of Disconnection Clauses

It is common practice for the framers of a treaty to include, if they so wish, a provision to the effect that an existing treaty shall not be affected.³⁵ According to Committee of Legal Advisers in International Law (CADHI):

[t]he term disconnection clause' is commonly used to refer to a provision in a multilateral treaty allowing certain parties to the treaty not to apply the treaty in full or in part in their mutual relations, while other parties remain free to invoke the treaty fully in their relations with these parties. It is not a term of art in international law, and the legal and practical effect of each provision depends upon its wording and the context in which it appears.³⁶

³² *ibid* para 83.

³³ *Time*, 12 July 1963.

³⁴ J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 377.

³⁵ A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 197–99.

³⁶ CADHI, Report on the So-Called 'Disconnection Clause'.

States sometimes make provision in multilateral treaties for accommodating possible conflicting treaties.³⁷ Article 104 of the NAFTA, entitled ‘Relation to Environmental and Conservation Agreements’, does this, stipulating that a number of environmental and conservation agreements shall, in the event of any inconsistency between the NAFTA and the agreements, ‘prevail to the extent of the inconsistency’. As Malgosia Fitzmaurice and Panos Merkouris have pointed out, there has in particular been an increase in the use of such ‘disconnection clauses’ in multilateral agreements to which the EU is a party. The aim of such clauses is to ensure that the EU rules will continue to apply amongst the EU Member States, leaving unaffected the relationships and corresponding rights and obligations between EU Member States and non-Members that are all parties to the treaty.³⁸ Definitions of disconnection clauses vary.³⁹

Signed at Prüm on 27 May 2005, the Prüm Convention or Schengen III Agreement, a treaty on the stepping up of cross-border cooperation in combating terrorism, cross-border crime and illegal migration,⁴⁰ has a disconnection clause in respect of EU law in its Article 47(1). The provision is in the following terms: ‘The provisions of this Convention shall apply only in so far as they are compatible with European Union law.’

Similarly, Article 27 of the 1988 Convention on Mutual Administrative Assistance in Tax Matters provides that: ‘Notwithstanding the rules of the present

³⁷ M Mendelson, ‘*Investment and BITs in Clinical Isolation? Conflicting Legal Obligations of Host States*’ (2009) 24 ICSID Review—FILJ 489, 491.

³⁸ M Fitzmaurice & P Merkouris, ‘Uniformity versus specialization: The quest for a uniform law of inter-State treaties’ in CJ Tams, A Tzanakopoulos, and A Zimmermann (eds), *Research Handbook on the Law of Treaties* (Elgar 2014) 364–65

³⁹ e.g. ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the ILC Study Group, finalized by M Koskenniemi, Chairman of the Study Group, A/CN.4/L.682 (2006), paras 289–94.

⁴⁰ 2617 UNTS 3

Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community’.⁴¹

What about the ECT, whose relationship with the EU is one which no doubt will have weighed on the minds of its framers? The ECT, possibly at the insistence of Norway, does indeed have a disconnection clause—not in respect of the EU Treaties, but in respect of the Svalbard Treaty,⁴² in Annex 2(1), which provides that: ‘[i]n the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict’. According to the time-hallowed maxim *expressio unius est exclusio alterius*, that which is omitted is understood to be excluded. In the present instance, when an EU disconnection clause was omitted by the parties—and one in respect of the Svalbard Treaty was indeed included—it must be understood wholly to be excluded. The parties should therefore be regarded as having implicitly agreed that in no way should EU law prevail in case of inconsistency: *expressio unius est exclusio alterius*. In *The Wimbledon*, the Permanent Court of International Justice famously relied on the *expressio unius est exclusio alterius* rule, observing in connection with the Treaty of Versailles of 1919 that: ‘If the conditions of access to the canal were also to be modified in the event of a conflict between two Powers remaining at peace with the German Empire, the treaty would not have failed to say so. It has not said so and this omission was no doubt intentional.’⁴³

The point is, in other words, that one should draw inferences from the fact that the EU treaties were *not* mentioned in the way that was the Svalbard Treaty. In the

⁴¹ 25 January 1988, 1966 UNTS 215.

⁴² 9 February 1920, 2 LNTS 8. See RE Fife, ‘L’objet et le but du traité du Spitzberg (Svalbard) et le droit de la mer’ in *La mer et son droit—Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Pedone 2003) 239.

⁴³ *The SS Wimbledon* (1923) PCIJ Series A No 1, p 23.

recent *Questions of the Delimitation of the Continental Shelf (Nicaragua v Colombia)* the International Court, with explicit reference to *Wimbledon*, sounded a caution in relation to this type of argument, which it called not by its traditional name, *expressio unius*, but instead an *a contrario* reading. The Court observed: ‘Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inferences its application requires in any given case.’⁴⁴ It is necessary, therefore, to be cautious, and context-orientated, in relying on an *expressio unius* or a *contrario* argument. Nevertheless, it seems that even on a context-orientated approach it can be assumed that, another disconnection clause having in fact been included, the parties can safely be said not to have intended to imply a disconnection clause in the ECT in respect of the EU Treaties.

In fact, the ECT contains a provision which specifically deals with other international law, and it does so in a particular way. Such a contextual exercise might take us to Article 16 ECT, which provides that: ‘Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III of this Treaty’ nothing in Part III or V of the ECT shall derogate from such agreements and, *vice versa*, nothing in the other agreement shall derogate from Part III or V of the ECT where, and this is crucial, ‘any such provision is more favourable to the Investor or Investment’.

⁴⁴ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections), Judgment of 17 March 2016, para 35.

That is what in the law of treaties is called ‘mobile priority’, another example of which is found in Article 53 ECHR, which provides for the priority of the human rights instrument offering the wider protection to the individual.⁴⁵ This kind of disconnection clause operates only to heighten protection for the claimant: for the investor under the ECT, for the individual under a treaty system such as the ECHR.

4. The External Relations of Other ‘Constitutional’ Regimes of International Law

Examples could be given from conventional regimes that, in common with EU law, to a certain extent consider themselves to be of a constitutional nature. First, the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁴⁶ famously branded ‘a Constitution for the Oceans’,⁴⁷ sets out in its Part XV rules for the resolution of disputes between States Parties arising out of the interpretation or application of the convention. Following the constitutional approach, some have argued that the International Tribunal for the Law of the Sea (ITLOS) goes too far in taking into account other international law than the UNCLOS.⁴⁸

It follows from Article 287(1) that a State may, when signing, ratifying, or acceding to UNCLOS, make a declaration choosing, amongst other options, *ad hoc*

⁴⁵ R Kolb, *The Law of Treaties* (Edward Elgar 2016) 188.

⁴⁶ 10 December 1982, 1833 UNTS 3.

⁴⁷ TTB Koh, ‘A Constitution for the Oceans: Statement of Ambassador Tommy TB Koh, President of the Conference, at its final session in Montego Bay, Jamaica, 11 December 1982’ in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea* (United Nations 1983) xxxiii, xxxvii (‘We worked not only to promote our individual national interests but also in pursuit of our common dream of writing a constitution for the oceans’); H Corell, ‘Speech Delivered at the Inaugural Session of the Tribunal of the Law of the Sea, 18 October 1996’ (1996–1997) 1 *International Tribunal of the Law of the Sea Yearbook* 1, 13. Also: M Johnson & B van Voorst, ‘A Constitution for the Seas’ *Time*, 8 September 1980.

⁴⁸ D Guilfoye & C Miles, ‘Provisional Measures and the MV *Arctic Sunrise*’ (2014) 108 *AJIL* 271.

arbitration, in accordance with Annex VII of the convention. Annex VII is indeed the default means of dispute settlement if a State has not expressed any preference and has not entered any reservation or optional exception under Article 298. In connection with the first Annex VII arbitration—*Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*⁴⁹—the International Centre for Settlement of Investment Disputes (ICSID) served as registry; for all other Annex VII arbitrations to date the functions of registry have been performed by the Permanent Court of Arbitration (PCA).⁵⁰ Instead of jealously fighting over jurisdiction, the organs of International Tribunal of the Law of the Sea have, through an exchange of letters between its Registrar and the Secretary-General of the PCA, agreed with the PCA to cooperate in relation to the relevant legal and administrative matters, exchanging documents connected with Annex VII disputes and exploring other kinds of cooperation in other areas of concern.⁵¹

Secondly—and even more in point—comes the example of the European Convention on Human Rights,⁵² consistently referred to by the European Court of Human Rights as ‘a constitutional instrument of European public order’.⁵³ On the one hand there is Article 32 and the jurisprudence of the Court applying that provision. Article 32 of the ECHR stipulates that the Strasbourg Court has jurisdiction over ‘all matters concerning the interpretation and application of the Convention’. The Court has held that ‘it alone is competent to decide on its jurisdiction to interpret and apply the Convention and its Protocol (Article 32 of the Convention), in particular with regard to

⁴⁹ *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (2000) 23 RIAA 1.

⁵⁰ e.g. *MOX Plant* (2001) 126 ILR 257; *Guyana/Suriname* (2007) 139 ILR 566; *Barbados v Trinidad and Tobago* (2006) 139 ILR 449; *Chagos Island (Mauritius v United Kingdom)* (2015) 162 ILR 1.

⁵¹ See the information on the website of the PCA in this regard: <https://pca-cpa.org/en/services/arbitration-services/unclos/>.

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

⁵³ e.g. *Loizidou v Turkey* (Preliminary Objections) (1995) 103 ILR 622, para 75.

the issue of whether the person in question is an applicant within the meaning of Article 34 of the Convention and whether the applicant fulfils the requirements of that provision'.⁵⁴ On the other hand there is Article 55 of the Convention, formerly Article 62, which is in the following terms:

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

As it was explained by Sir Samuel Hoare during the drafting of this provision, a consideration that weighed with the drafters was the 'proliferation of organs with tremendous difficulties for the definition of their respective jurisdiction'.⁵⁵ As explained by William Schabas, however, 'Article 55 does not entirely exclude the possibility that human rights issues as well as related matters are addressed in other fora',⁵⁶ and the Strasbourg organs, including the Court, have taken a broad-minded approach to the question. Two examples show this. First regarding the matter of Süd Tirol/Alto Adige Italy and Austria, having initially submitted an inter-State application to the Commission,⁵⁷ subsequently reached an agreement, which agreement contained a compromissary clause in which the parties agreed to submit disputes not to the

⁵⁴ *Shamayev & Others v Georgia & Russia*, no 36378/02, ECHR 2005–III, para 293.

⁵⁵ Minutes of the afternoon sitting, 9 June 1950, *Travaux préparatoires to the ECHR IV*, 124.

⁵⁶ W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2014) 913. Also: E Decaux, 'Article 62' in LE Pettiti and others (eds), *La Convention européenne des droits de l'homme* (2nd edn, Economica 1999) 912–13.

⁵⁷ (1960) 3 Yearbook of the European Convention on Human Rights 168–71.

Strasbourg Court but to the International Court of Justice. No Strasbourg organ registered any misgivings.⁵⁸

Secondly, in the dispute between Georgia and Russia, Georgia relied upon the compromissory clause in the International Convention on the Elimination of All Forms of Racial Discrimination⁵⁹ in order to bring a case before the International Court of Justice. In 2011 the International Court granted a preliminary objection filed by Russia, finding that Georgia had failed to exhaust the route of negotiation before seizing the Court.⁶⁰

During the pendency of the proceeding before the International Court, however, Georgia had filed a case before the European Court of Human Rights.⁶¹ The rule against similar proceedings set out in Article 35 ECHR does not apply to inter-State proceedings. As the case before the International Court had been rejected, no problem of *lis pendens* arose: but what of Article 55? The Court did not explicitly touch on Article 55.⁶² Schabas has wisely observed view that: ‘Georgia may well have breached article 55 of the Convention, although it is hard to see what consequence this could have in judicial proceedings. Jurisdiction before either the International Court of Justice or the European Court of Human Rights could not be defeated merely because one of the States had failed to respect Article 55 of the Convention.’⁶³ As a matter of principle, that view must be correct. It is not that ‘every tribunal is a self-contained system’.⁶⁴ But the question of breach by a party of a treaty not at issue before the ‘*tribunal de céans*’

⁵⁸ See A Fenet, ‘La fin du litige italo–autrichien sur le Haut-Adige-Tyrol du Sud’ (1993) 39 AFDI 357.

⁵⁹ 21 December 1965, 660 UNTS 195.

⁶⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections), ICJ Rep 2011 p 70.

⁶¹ *Georgia v Russia* (dec.), no. 38263/08, 13 December 2011.

⁶² *Georgia v Russia* (dec.), no. 38263/08, 13 December 2011, para 79.

⁶³ W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2014) 914.

⁶⁴ *Prosecutor v Tadic* (Jurisdiction) (1995) 105 ILR 419, 458.

is on the whole an extraneous matter to the interpretation and application of the treaty of which the tribunal is in fact seized. Thus, as regards the jurisdiction of an investment tribunal seized of claims based on intra-EU bilateral investment treaties or the ECT, jurisdiction cannot be held to be defeated owing to the breach or alleged breach by the Respondent State of the rules of another system on international law, in the event EU law.

5. Assessment

Of course investment tribunals must be cognizant of the fact that investment law is a part of the larger canvas of international law, and that a BIT or the ECT is not to be interpreted in a vacuum. As the International Court put it in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, no branch of international law can be thought to operate ‘in a vacuum’; rather it operates with ‘relation to facts and in the context of a wider framework of legal rules of which it forms only a part’.⁶⁵ Certain international courts and tribunals have gone far, some have argued too far,⁶⁶ in taking seriously this approach.⁶⁷ But that approach has certain limits, limits which flow

⁶⁵ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* ICJ Rep 1980 73, 76 para 10. See also e.g. *The Kronprins Gustav Adolf* (1932) 2 RIAA 1246–7; *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep 1949, p 182; *Fubini Claim* (1959) 29 ILR, p 46; *Golder v United Kingdom* (1975) 57 ILR 200, 217, para 35; *Demir & Baykara v Turkey* [GC], no. 34503/97, ECHR 2008, para 71; H Lauterpacht, *The Development of International Law by the International Court* (1958) 26–31; ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the ILC Study Group, finalized by M Koskenniemi, Chairman of the Study Group, A/CN.4/L.682 (2006), paras 46–222, which drew on C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 43 ICLQ 281; M Andenas, ‘Reassertion and Transformation: From Fragmentation to Convergence in International Law’ (2015) 46 Georgetown JIL 685; P Webb, *International Judicial Integration and Fragmentation* (2013) Ch 5.

⁶⁶ F Berman, ‘Treaty “Interpretation” in a Judicial Context’ (2004) 29 YJIL 315; D Guilfoye & C Miles, ‘Provisional Measures and the MV *Arctic Sunrise*’ (2014) 108 AJIL 271.

⁶⁷ *Oil Platforms (Iran v USA)*, ICJ Rep 2003, p 182–3; *Arctic Sunrise (Netherlands v Russian Federation)*, ITLOS Case No 22 (Provisional Measures, 22 November 2013); *Hassan v United Kingdom*

from the treaty to be interpreted. This is exemplified by the distinguished Tribunal⁶⁸ in *Indus Waters Kishenganga (Pakistan v India)*.⁶⁹ The *Kishenganga* Tribunal, in its interpretation of the Indian–Pakistani Indus Waters Treaty and Annexures, underscored that in interpreting the treaty ‘principles of international environmental law must be taken into account’.⁷⁰ However, Paragraph 29 of Annexure G to the Indus Waters Treaty made clear that:

the law to be applied by the Court shall be this Treaty and, whenever, necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed: (a) International conventions establishing rules which are expressly recognized by the Parties; (b) Customary international law

Thus the Tribunal noted that ‘the place of customary international law in the interpretation and application of the Indus Waters Treaty remains subject to Paragraph 29’; ‘this Treaty expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself’.⁷¹ The Tribunal concluded that:

if customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be

(2014) 161 ILR 524, para 77.

⁶⁸ The Tribunal consisted of: Sir Frank Berman; Professor Howard S Weather; Professor Lucius Caflisch; Professor Jan Paulsson; Judge Bruno Simma; Judge Peter Tomka; Judge Stephen M Schwebel, Chairman.

⁶⁹ *Indus Waters Kishenganga (Pakistan v India)* (Final Award) (2013) 157 ILR 362.

⁷⁰ *Indus Waters Kishenganga (Pakistan v India)* (Partial Award) (2013) 154 ILR 1, 173 para 452.

⁷¹ *Indus Waters Kishenganga (Pakistan v India)* (Final Award) (2013) 157 ILR 362, para 111.

‘interpretation or application’ of the Treaty but the substitution of customary law in place of the Treaty.⁷²

That is the danger—that other international law is ‘applied not to circumscribe, but to negate rights expressly granted in the Treaty’ which the court in question is entitled to interpret and apply. There is a lesson here for investor–State tribunals.

Under the ECT there is no doubt as to what is the applicable law. Article 26(6) ECT leaves little to be desired in terms of clarity: ‘A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.’⁷³

In proceedings conducted under the ICSID system, the picture is slightly more complicated: but the bottom line is to all intents and purposes the same. The applicable law is the BIT. ICSID Article 42(1) provides that: ‘The Tribunal shall decide a dispute in accordance with such rules ... as may be agreed by the parties’. In most situations (but admittedly far from all), with a view to protecting investors’ interests against the vagaries of the host State’s law, the choice has been made to internationalize the agreement.⁷⁴ This is most frequently done by making reference to international law or general principles of international law, possibly together with the law of the host State. There is a clear tendency among ICSID Tribunals to treat cases of treaty claims brought on the basis of BITs as involving an implicit determination on the part of the parties in favour of international law.⁷⁵ As Christoph Schreuer has pointed out:

⁷² *ibid* para 112.

⁷³ See TW Wälde, ‘International Investment under the 1994 Energy Charter Treaty—Legal, Negotiating and Policy Implications for Investors within Western and Commonwealth of Independent State/Eastern European Countries’ (1995) 29 *Journal of World Trade* 5, 60.

⁷⁴ See C Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 560.

⁷⁵ *ibid* 578. E.g. *Asian Agricultural Products Ltd v Sri Lanka* (1997) 4 ICSID Rep 256, paras 19–20.

In investment treaty arbitration, claimants regularly assert violations of the substantive treatment standards contained in the applicable investment instrument. Even in the absence of any express choice of law provisions, it is generally accepted that the substantive provisions of these treaties constitute the rules of law applicable to the dispute.⁷⁶

The point is that it is not for an investment tribunal to engage in ‘the substitution’ of EU law ‘in place of’⁷⁷ the applicable law of the ECT or the BIT. That would not be loyal application of the applicable law of the Tribunal.

The question of the application of EU law in investment arbitration could also be conceived of as being no more than facts—this approach has been opted for in, eg, the EU–Vietnam⁷⁸—whereby EU law is conceived of as no more than ‘relevant domestic law’ to be ‘take[n] into consideration, as matter of fact’. This is reminiscent of the holding of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*, to the effect that ‘[f]rom the standpoint of International Law and the Court which is its organ, national laws are merely facts’,⁷⁹ a dictum the operation of which leads to several difficult problems which lie beyond the scope of this paper.⁸⁰

⁷⁶ C Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 578.

⁷⁷ *Indus Waters Kishenganga (Pakistan v India)* (Final Award) (2013) 157 ILR 362, para 112.

⁷⁸ Art 16, EU–Vietnam Free Trade Agreement, 1 February 2016 (‘When rendering its decisions, the Tribunal shall apply the provisions referred to in Article 1(1) (Scope) and other provisions of this agreement as applicable, as well as other rules or principles of international law applicable between the Parties, and take into consideration, as matter of fact, any relevant domestic law of the disputing Party.’).

⁷⁹ *Certain German Interests in Polish Upper Silesia* (1926) PCIJ Series A, No 7, 19.

⁸⁰ See e.g. CW Jenks, ‘The Interpretation and Application of Municipal Law by the Permanent Court of International Justice’ (1938) 19 BYIL 67; CW Jenks, *The Prospects of International Adjudication*

Investment tribunals should not decline to take jurisdiction simply by reason of the annoyance that might be caused to the CJEU in the event that they do so.

6. Conclusion

As Gilbert Guillaume has observed in a different connection, in an invited *amicus* brief⁸¹ in a case before the *Assemblée générale* of the Conseil d'État in *Kandyrine*,⁸² general international law does not always furnish ready answers to questions of seemingly concurrent treaty obligations: sometimes one has to make a choice as to which treaty to follow and which to breach. What applies in such situations is the '*Prinzip der politischen Entscheidung*'—the determination may become a 'political' one. Jurisdiction before a Tribunal hearing a BIT or ECT claim can scarcely be defeated owing to the fact that the CJEU takes the view that, according to its authoritative understanding of EU law, EU law would thus be breached. For such a Tribunal the right political choice would be to follow *its* treaty, the applicable law which it is its vocation to apply—that is, the BIT or the ECT. EU law cannot be relied on 'to negate rights expressly granted'⁸³ in the BIT or the ECT, no more than, in the context of proceedings before the CJEU, a BIT or the ECT could be relied on to negate rights expressly granted by the Treaties of the EU—a prospect that, incidentally, the EU institutions would never countenance.

(Stevens & Sons 1964) 552; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 52–54.

⁸¹ *Amicus* brief of G Guillaume in (2012) 28 *Revue française de droit administratif* 19.

⁸² Conseil d'État (2012) 28 *Revue française de droit administratif* 17 (conclusions: J Boucher).

⁸³ *Indus Waters Kishenganga (Pakistan v India)* (Final Award) (2013) 157 ILR 362, para 112.